Supreme Court, U.S.
FILED
07-535 OCT 19 2007
OFFICE OF THE CLERK

No. 07-

IN THE
Supreme Court of the United States

MAJOR FRANK MATREALE,

Petitioner,

v.

STATE OF NEW JERSEY
DEPARTMENT OF MILITARY AFFAIRS
and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the intra-military immunity doctrine, judicially created in *Feres v. United States*, 340 U.S. 135 (1950), exceeding the scope of the statutory language from which it was derived, should, after 50 years of judicial and academic criticism, as well as repeated requests for this Court to re-review the doctrine, including such a request by a member of the Circuit Court panel below, is overbroad and fails to meet the judicially created purpose of promoting military discipline?

2. Whether the Constitution allows the extinguishment of a claim by, and whether the *Feres* doctrines reaches to, a state Guardsman who was and remains under State control, who has a state statutory claim, exclusively under state law against that State Department of Military Affairs, and not against the United States, and who, according to prior, established law, acts as a State, and not a federal actor?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is a New Jersey resident who was serving in the New Jersey Army National Guard under orders issued pursuant to 32 U.S.C. § 502(f) when, he alleges, his career was stymied as a result of retaliation for his participation in an investigation which found sexual harassment. Respondent is the State of New Jersey Department of Military Affairs. The United States is the Intervenor.

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Petitioner Colonel Frank Matreale respectfully submits this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 487 F.3d 150 (3d Cir. 2007). App., *infra*, 1a-22a. The opinion of the United States District Court for the District of New Jersey is reported at 418 F. Supp. 2d 603 (D.N.J. 2006). App., *infra*, 22a-36a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on May 22, 2007. A petition for a writ of *certiorari* was filed on October 19, 2007. By application granted August 10, 2007 the Court granted an extension of time within which to file a petition for a writ of *certiorari* to and including October 19, 2007.

STATUTES INVOLVED

The Federal Tort Claims Act, 28 U.S.C. § 2671 provides, in relevant part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or punitive damages.

28 U.S.C. § 2674.

> The provisions of this chapter and section 1346(b) of this title shall not apply to
>
> > (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

28 U.S.C. § 2680.

> "Employee of the government" includes officers or employees of any federal agency, members of the military . . . members of the National Guard while engaged in training or duty under section 502 of title 32.

28 U.S.C. § 2671.

REASONS FOR GRANTING THE PETITION

This Petition raises both a question relating to the continuing vitality of the "*Feres*" doctrine and, more specifically, a question as to whether the doctrine applies to a state National Guard actor, serving in a state capacity and under state direction, who has brought an action against the State of New Jersey for a state statutory violation not implicating the FTCA. Consequently, the second issue is whether intra-military immunity can reach state Guardsmen absent express federal pre-emption.

As to the first issue, the *Feres* doctrine, as established by *United States v. Feres*, 340 U.S. 135 (1950), has, for fifty years, been the subject of continual

criticism. In fact, in the Third Circuit's decision, Circuit Court Judge Smith felt compelled to write a separate concurrence in order "to note that this Court, again and again, has dutifully applied the *Feres* doctrine in spite of perceived injustice and possibly in opposition to the actual text of the FTCA, but noting that we are bound to do so unless and until the Supreme Court or Congress tells us otherwise." (App. 18a) In doing so, he cited no less than ten cases from the Third Circuit alone, where various Circuit Court Judges from that Court, including many jurists of singular note and reputation, had, in the words of one had "urge[d]" this Court to "grant certiorari and revisit what we have wrought" with *Feres*. (App. 18a) (*quoting Richards v. United States*, 180 F.3d 564, 565 (3d Cir. 1999) (Rendell, *J.*, dissenting from a denial of a petition for rehearing *en banc*). Commentary also criticizes the basis and results of this anomalous doctrine. *E.g.*, Turley, *Pax Militaris: The Feres Doctrine*, 71 GEORGE WASHINGTON L. REV. 1 (2003); Schwartz, *Making Intramilitary Tort Law More Civil: a Proposed Reform of the Feres Doctrine*, 95 YALE LAW JOURNAL 992 (1986). This case, inasmuch as it presents a situation where, at a minimum, as discussed immediately below, there has been a specific extension of *Feres* beyond what this Court has previously ruled upon, and this extension conflicts with other precedent, including rulings from this Court, defining state national guardsmen as state actors, should allow for the opportunity to revisit *Feres*.

As to the second issue, as set forth below, this case presents a situation where *Feres* is being extended to and applied in a situation far beyond its mooring in the Federal Tort Claims Act. Indeed, the claim is brought against the *New Jersey* State Department of Military Affairs, an

entity that is an arm of the State of New Jersey and which exists under the control of the Governor of the State of New Jersey. The Petitioner-Plaintiff was an employee of the State of New Jersey under well-established precedent from this Court, as well as other courts because he was a Guardsman under Title 32, 32 U.S.C. § 101, *et seq.* The difference between Title 32 and Title 10, 10 U.S.C. § 101, *et seq.*, is well-established and, as relevant here, conflicts with the very grounding of the *Feres* in the Federal Tort Claims Act and the recognition that a person serving in the military either serves under the State (under Title 32) or under the Federal (under Title 10) sovereign, but not both at the same time, a distinction with a grounding in the Constitution and its precepts of federalism.

STATEMENT OF THE CASE

In 1999, then Colonel Matreale was serving in the New Jersey Army National Guard (hereinafter NJARNG) as a Recruiter. Colonel Matreale was serving under the State Adjutant General, a New Jersey constitutional officer. In or about 1999, an enlisted female officer was sexually harassed by her superior Sergeant Major. Col. Matreale supported the claim of sexual harassment by providing a witness statement. As a result, he alleges in the present action that he suffered retaliation by the NJARNG in the form of negative reviews and failure to promote. In 2003, he brought suit in New Jersey State Court asserting a New Jersey State law statutory claim against the New Jersey Department of Military Affairs.

The United States, against whom no claim has been presented nor against whom no claim could be brought, intervened and removed this case to the District of New Jersey. There, the defendants – NJARNG and the United States – moved to dismiss the case on a motion for summary judgment asserting intra-military immunity. The federal district court, on March 8, 2006 granted the motion. The Third Circuit affirmed solely based upon intra-military immunity. 1a-21a.

ARGUMENT

I. The Feres Doctrine Should Be Reexamined, Or Limited, By This Court.

The *Feres* doctrine of intra-military immunity, precluding service men from suit for incidents "related to" service is historically rooted in the Federal Tort Claims Act ("FTCA"). Notwithstanding the breadth of the doctrine, which has accumulated after decades of expansion, the doctrine lacks textual support. Very simply, the FTCA states that combatants during time of war are precluded from bringing suit against the United States. Despite the clear reach of this term's statutory exclusion, this Court in 1951 effectively wrote out the term "combatant activity" and replaced it with a far broader "incident to service" test, effectively excluding any claim for money damages against the United States by a member of the United States military. In this case, as set forth in the next argument, the court below has now expanded the reach of the doctrine to include state guardsmen claims under state statutory law in situations far removed from any fair conception of what constitutes a "combatant's" activity.

The FTCA was initially taken up in *Brooks v. United States*, 337 U.S. 49 (1949). There this Court held that servicemen may sue the United States under the FTCA for injury "not related" to service. The Court recognized that there are 12 clearly defined exclusions within the FTCA itself. *Brooks* at 51 citing 28 U.S.C. 2680. One exception is for "combatant activity". *Id.* at 51. *Brooks*, though, left open whether injury "related to service" would supplant the definition of the Act's term "combatant activity".

The Court addressed this issue next in *Feres v. United States*, 340 U.S. 135 (1950). *Feres* expanded the terms "in times of war" and "combatant activity" to anything "related to service". It is an understatement to say that this expansion by the Court – what could be considered judicial legislating – has been the subject of strong criticism and confusion. *See, e.g., Taber v. Maine*, 67 F.3d 1029, 1038-53 (2d Cir. 1995). From judges in the federal judiciary who have had to apply the doctrine notwithstanding what to them appeared to be inequitable and unjust results, a chorus of criticism has long been forthcoming, as is captured by the concurrence in the decision in this case:

> "As Justice Scalia stated in his oft-cited *Johnson v. United States* dissent, the exception in § 2680 (j)" [the exception for combatant activities in time of war] "illustrates that 'Congress specifically considered, and provided what it thought needful for, the special requirements of the military. There was no proper basis for [the Supreme Court] to supplement–i.e. revise–the congressional disposition'".

App. at 20a. The *Johnson* dissent captures this Court's constitutional over reach and itself provides the

jurisprudential reasoning for granting *certiorari*. *Feres* reasoned that the term "person" within the FTCA, particularly that the United States government would be liable as any "person", must preclude suit against the military because no "person" can raise an army. No "person", though, can deliver first class mail, approve drugs to market, or do any function within the peculiar province that Congress sets out for the federal government and yet these federal employees have no such preclusion.

The second, the "fairness" rationale for the doctrine enunciated in *Feres* is that the military stations soldiers throughout the United States, and that it would be unfair to have recovery rise and fall based upon situs of the injury. Nonetheless, this, to proves too much since other, non-military service related federal government activities can similarly rise and fall upon where the government stations its work force. Just as military personnel can be deployed in different states, so, too, can federal workers be required to work where employment is required, or stationed such as Marshals, Federal Emergency Management Agency employees, Federal Bureau Investigation employees, etc. The list is probably as broad as any federal job title manual. Yet, claims incident to service for those federal employees and personnel are permitted which are routinely governed by the law of the state where the injury arose.

Finally, while to preclude all suits does indeed create uniformity, uniformity *per se* is hardly an equitable result and, for the vast majority of situations, the differences between state's laws are in matters of detail not in fundamental reach.

The third *Feres* rationale of exclusivity of the worker's compensation, or Veteran's Benefit Act (VBA) allowance, has similarly been discredited. The *Johnson* dissent recognized that there is no such exclusivity, relying upon *Brooks v. United States*, 337 U.S. 49, 51-52 (1949) and *United States v. Brown*, 348 U.S. 112 (1954). Quoting the *Johnson* dissent: "the presence of an alternative compensation system [neither] explains [n]or justifies the *Feres* doctrine; it only makes the effect of the doctrine more palatable." *Hunt v. United States*, 636 F.2d 580, 598 (1980).

The *Feres* doctrine rationale which persists today as currency, is the perception that permitting suit would have an unacceptable negative impact upon military discipline. But Congress did not so write in the Act. Congress imposed a limitation on suit to situations involving "combatant" activity. The doctrine therefore is founded upon a judicial perception of what public policy should be, rather than upon the legislative intent of what the law actually is and states. Ironically, it is considered that the effect of the policy could well be inimical to military discipline itself. *Id.*; *see* Schwartz, *supra*, 95 YALE LAW JOURNAL at 1007. When members of the military believe they can act with impunity and without recourse, except for the chance of a military tribunal acting itself, these unaccountable over-reaches can have deleterious consequences for subordinates, the image of the military, and some might argue that in some cases, actually impinges upon the image of the country and uniform abroad where perceived lack of accountability may result in combat errors.

Feres has expanded to deny all forms of recovery by servicemen irrespective of Congress' limited exceptions. In *Chappelle v. Wallace*, 462 U.S. 296 (1983) the Court held, for instance, that pursuant to *Feres*, a service man may not pursue a *Bivens v. Six Unknown Fed. Narcotic Agents*, 403 U.S. 388 (1971) claim because military discipline is a special factor. Ultimately, this means regardless of how egregious the constitutional violation, and no matter how intentional was the act against the service man, there can be no suit.

In *United States v. Stanley*, 483 U.S. 669 (1987) this Court found unqualified immunity for unauthorized, and patently illegal medical testing, on soldiers who volunteered to provide themselves for chemical warfare apparel testing, but instead were dosed with lysergic acid diethylamide, *i.e.* LSD. This Court declined even to apply a standard which would allow suit for conduct "so egregious that no responsible officer would" believe immunity could exist. *Id.* at 681. Instead it indoctrinated the *Feres* "incident to service" test, precluding service such that no suit can be brought for any actions which were incident to service.

The approach taken in *Stanley* affirms the result in *Gaspard v. United States*, 713 F. 2d 1097 (5th Cir. 1983) which denied suit under *Feres*, where the Petitioners were subject to nuclear explosions while stationed in open trenches. These soldiers were then directed to march into the nuclear fall out. The plaintiffs therein reasonably alleged the orders were knowingly and intentionally given with the understanding that the consequences of these orders would have debilitating and fatal consequences upon these troops. Despite the

inhumanity of this result, the Fifth Circuit was required to apply the "incident to service" standard.

What stands now is a judicially created doctrine precluding suit on the happenstance of whether it is "related to service", regardless of what impact such a suit would have upon military discipline. As it stands, courts must acquiesce in needless brutality, self-inflicted against our nation's troops. In this case it permitted a scheme whereby an officer's career was harmed when he sought to protect soldiers from oppressive harassment. This Court could, for instance, employ a standard that an exception to the "combatant" exclusion exists for suits alleging intentional conduct outside of conduct in a theater of engagement. Certainly, standards can be derived which would permit courts to act as appropriate gate keepers.

II. The Extension of the *Feres* Doctrine to A National Guardsperson While Acting Under Title 32, And Not Title 10, Was Error And Conflicts With Otherwise Established Precedent.

The trial court below aptly characterized the issue as to whether *Feres* should extend to the State National Guard serving under command of a State Governor as one of first impression: "Neither the Supreme Court nor the Third Circuit have been presented with a case where, as here, a guardsman has brought a state statutory claim against a state department of military affairs." App. 30a. Logically, a State national guardsperson bringing suit against a sovereign State should have nothing whatever to do with the Federal Tort Claims Act or even federal law. It cannot be held, nor implied, that an issue of

preemption is presented. The question should be whether or not the New Jersey Supreme Court would apply intra-military immunity to its State Guardsmen.

Irrespective of whether *Feres* should apply to other individuals, it certainly should not apply to State Guardspeople. In enacting the FTCA, Congress specifically included such personnel under its definition of national guardspeople but there is a significant distinction that has been lost in this case because individuals in the national guard have been found to be state employees under established law, even by decisions of this Court when they are under Title 32, as opposed to Title 10. As has been recognized, while Guardsmen may have dual enlistment status, they can only serve one sovereign at any given time, *Perpich v. Department of Defense*, 496 U.S. 334, 338 (1990), and, in this case, at least, Petitioner was serving the New Jersey guard and not engaged, in any manner, in a combat role or other role for the federal army. Under *Perpich* a Guardsmen is a State employee unless and until activated under Title 10, or federal training as provided in the statute. *Id.* at 345-47.

The Third Circuit's reasoning below in expanding *Feres* is unconstitutional inasmuch as it negates the dual enlistment principles set forth in *Perpich*, which, in turn, are grounded in effectuating the terms of the Constitution itself. *Perpich* at 340-45 (describing Congress implementation of the constitutional federal/state compromise.)

The result of extending *Feres* to the States' National Guardspeople when they serve in Title 32 capacity was

premised upon the conclusion that Petitioner was a federal or dual actor, as opposed to a state employee. (Appendix 11a; 13a) ("Matreale attained dual status as a member of both the National Guard of the United State and the NJARNG when he accepted his commission as an officer.") The opinion recognized that Matreale was acting under 32 U.S.C. § 502 (f) which provides that a Guardsman may be called into a federal training program under federal regulation. (App. 10a) In reaching its result, the Third Circuit turned established law, and that of other courts, on its head in finding that Guardsmen are federal employees. *Karr v. Castle*, 746 F. Supp. 1231, 1237 (D. Del. 1990) *aff'd U.S. v. Carper*, 22 F.3d 202 (3rd Cir. 1994):

> The intent of Congress was more fully set forth in H.R. Rep. No. 943, 97th Cong., 2d Session 31 (1982), which stated that 'the intent of Congress was, and is, that National Guard personnel serving in the 'Full-Time Manning Program' now included in a DOD program called Active Guard and Reserve (AGR) serve under 32 U.S.C. 502 (f) in conventional National Guard status, i.e. under state control, as opposed to service in the active military service of the United States in Reserves of the Army or Reserves of the Air Force status'. Thus, National Guard AGR personnel are on full-time duty under state control, and are not automatically bestowed the benefits and privileges of federal service.

See Kise v. Department of Military and Veterans Affairs for Pennsylvania, 574 Pa. 528, 540-41 (2003) (Guardsmen

are state employees). Similarly, it was recognized by *State Department of Military and Veterans Affairs v. Bowen*, 953 P.2d 888, 899 (Alaska 1998) (same), relying upon *Maryland v. United States*, 381 U.S. 41, 48 (1965):

> their appointment by state authorities and the immediate control exercised over them by the states makes it apparent that military members of the guard are employees of the state's, and so the courts of appeals have uniformly held.

See also Jaffee v. United States, 663 F.2d 1226 n.7 (3rd Cir. 1981) (recognizing that absent call-up under Title 10, Guardspeople are State employees); *Amico v. New Jersey National Guard*, 577 A.2d 1298, 1299, 242 N.J. Super. 634, 636 (App. Div. 1990) (same); *Clark v. United States*, 322 F.3d 1358, 1366 (Fed. Cir. 2003) (same).

The Third Circuit's creation of a "dual" status, at least as is here relevant, thus fails to comport with this Court's recognition that only one status or hat can be worn at any one single time. *Id.* at 348. This is because, while *Perpich* held that the Commander in Chief has absolute authority to activate under Title 10, unless and until he makes this political decision, the Constitution provides a balance, and particularly the Congressional mandate of the Act interpreting the constitution requires that Title 32 officers are State employees. *See also, e.g.*, 18 U.S.C. § 1385 precluding federal force from acting as a *posse comitatus* except in limited statutorily defined emergencies; *see also C.J. Vuinovich*, 599 A.2d 548, 552, 252 N.J. 122, 131 (App. Div. 1991) (National Guard is a subdivision of the State).

The decision below thus dangerously impacts the constitutional and legislative implementation of the dual enlistment program, turning the established law on its head and creating, wholesale, a new "dual" status. Col. Matreale was a New Jersey State employee at the time of the occurrence, suing under State law. There is no federal reach to preclude such suit, absent an erasure of *Perpich* and the Constitutionally mandated dual enlistment program, which was balanced in order to avoid dual sovereignty.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October 19, 2007

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MAY 22, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-2051

MAJOR FRANK MATREALE,

Appellant

v.

STATE OF NEW JERSEY DEPARTMENT OF MILITARY & VETERANS AFFAIRS; NATIONAL GUARD OF THE UNITED STATES

On Appeal from the United States District Court
for the District of New Jersey
Civil No. 05-2032
District Judge: The Honorable Joseph E. Irenas

Argued February 13, 2007

Before SMITH and FISHER, *Circuit Judges*,
and DIAMOND, *District Judge*.*

(Filed: May 22, 2007)

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* The Honorable Gustave Diamond, Senior District Judge for the Western District of Pennsylvania, sitting by designation.

Appendix A

OPINION

DIAMOND, *District Judge.*

Major Frank Matreale, a commissioned officer in the New Jersey Army National Guard (NJANG) serving under orders issued pursuant to 32 U.S.C. § 502(f)(1),[1] brought suit in the Superior Court of New Jersey against the New Jersey Department of Military and Veterans Affairs (NJDMVA), the overseer of the NJANG, to recover damages for retaliation under the New Jersey Law Against Discrimination (NJLAD). The National Guard of the United States intervened and the case was removed from state court to the United States District Court for the District of New Jersey. Applying the

1. That section provides in pertinent part:

> Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force . . . a member of the National Guard may—
>
> (A) without his consent, but with the pay and allowances provided by law; or
>
> (B) with his consent, either with or without pay and allowances;
>
> be ordered to perform training or other duty in addition to that prescribed under subsection (a) [required drills and field training.]

doctrine of intra-military immunity first enunciated in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), the District Court granted summary judgment in favor of the NJDMVA.

The issue before us is whether the *Feres* doctrine of intra-military immunity bars a suit raising state law claims for damages for injuries arising from, or in the course of activity incident to, military service brought against a state national guard by a guardsman serving under Title 32. We hold that it does and will affirm the District Court's grant of summary judgment.

I.

The District Court had jurisdiction pursuant to 28 U.S.C. § § 1346(b) and 1331. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over the District Court's grant of summary judgment and employ the same analysis required of the District Court to determine whether there are any issues of material fact that would enable the nonmoving party to prevail. *Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 203 (3d Cir.2005). Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). At the summary judgment stage, we view all evidence and consider all reasonable inferences in a light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

Appendix A

II.

In July of 1999, pursuant to an ongoing official investigation, Matreale provided to Lt. Col. Kent Milliken, his direct supervisor in the NJANG, a statement supporting a female guardsman's accusation that she had been sexually harassed by an NJANG Sergeant Major. An inquiry ultimately concluded that the accuser in fact was sexually harassed.

Matreale, contending that based on his role in the sexual harassment investigation, Milliken and other NJANG officers subsequently engaged in a course of retaliation against him, including, *inter alia*, negative performance evaluations and other disciplinary measures based on accusations that he had engaged in an improper superior-subordinate relationship with the female sexual harassment victim, sought redress in the suit referred to above.

The District Court, in granting summary judgment in favor of the NJDMVA, found that Matreale, serving under Title 32, was a federal employee for immunity purposes and concluded that his state law claims for damages were barred under the *Feres* doctrine of intra-military immunity because the injuries for which he sought recovery arose out of, or were incurred in the course of activity incident to, his military service. The District Court further held that Matreale's requests for reinstatement, promotion and other injunctive or declaratory relief were non-justiciable.

Appendix A

III.

The doctrine of intra-military immunity upon which the District Court relied in dismissing Matreale's damages claims had its genesis in *Feres*, *supra*, a consolidation of three cases in each of which the claimant while on active duty in the United States Armed Forces sustained an injury due to the negligence of others in the armed forces. The Supreme Court held that the federal government was not liable under the Federal Tort Claims Act for injuries to servicemen arising out of, or in the course of activity incident to, military service. 340 U.S. at 146, 71 S.Ct. at 159. The Court noted that "without exception, the relationship of military personnel to the Government has been governed by federal law," *id.*, and that no federal law "has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving." 340 U.S. at 141, 71 S.Ct. at 157.

Although only alluded to in *Feres*, the Supreme Court subsequently expounded upon the underlying rationale for the intra-military immunity doctrine and described it as being predicated upon:

> [t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits . . . were allowed for . . . negligent orders given

> or negligent acts committed in the course of military duty ....

United States v. Brown, 348 U.S. 110, 112, 75 S.Ct. 141, 143, 99 L.Ed. 139 (1954).

In *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), the Supreme Court expanded the reach of the *Feres* doctrine to bar a *Bivens*[2] claim for damages brought by federal servicemen against their federal superior officers alleging constitutional violations resulting from alleged racial discrimination in assignments, evaluations and punishment. As in *Feres*, the Court relied primarily upon "the peculiar and special relationship" between a soldier and his superiors, and the potential effects of permitting such lawsuits on military discipline, in holding that the doctrine of intra-military immunity barred *Bivens* damages claims. *Chappell*, 462 U.S. at 304, 103 S.Ct. at 2367.

Without exception, in other post- *Feres* cases, the Court has adhered to the compelling necessity of maintaining military discipline as the basis for expanding the intra-military immunity doctrine to encompass a variety of claims, against an assortment of defendants, brought by a range of servicemen, for injuries arising out of, or in the course of activity incident to, military

2. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the Supreme Court authorized suits against federal officials whose actions violate an individual's constitutional rights.

service. *See United States v. Stanley*, 483 U.S. 669, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987) (*Feres* "incident to service" test equally applicable in *Bivens* cases brought by serviceman against military officers and civilians); *United States v. Johnson*, 481 U.S. 681, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987) (barring FTCA claim against civilian defendant by widow of serviceman killed in rescue mission); *United States v. Shearer*, 473 U.S. 52, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985) (barring FTCA claim against United States arising from murder of off-duty serviceman by another serviceman); *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977) (barring claim for indemnification against United States brought by a government contractor in a negligence suit filed by a National Guardsman on a training mission).

Following the Supreme Court's rationale in those cases, in defining the scope of the *Feres* doctrine we too have recognized the adverse impact on military discipline inherent in the judicial review of military orders and have sought to avoid it. In *Jaffee v. United States*, 663 F.2d 1226, 1239 (3d Cir.1981), we held that the *Feres* doctrine extends to bar a federal serviceman's state law intentional tort claim against his Army supervisors. We recognized two potential consequences of permitting suits for service injuries: their effect on the willingness of military personnel to follow the directions of their superiors and the concomitant chilling effect that the concern of being called into civilian court may have on the discharge of the decision-making duties of military authorities. *Id.* at 1232. Of particular significance to the

matter presently before us, we noted in *Jaffee* that "[s]uits founded on state law have the same potential for undermining military discipline as federal tort claims." *Id.* at 1239.

Later, in *Jorden v. National Guard Bureau*, 799 F.2d 99, 104-05 (3d Cir.1986), we determined that the reasoning in *Chappell, supra*, barring *Bivens* damages claims against federal military officers, was equally applicable to a § 1983 action brought by a full-time civilian technician in a state national guard against state military officers in light of the Supreme Court's decision in *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), which unequivocally held that *Bivens* claims and § 1983 claims are to be treated as identical for immunity purposes. We observed that in *Chappell* the Supreme Court "was laying down a general rule barring damages actions by military personnel against superior officers for constitutional violations, rather than authorizing a fact-specific inquiry." *Jorden*, 799 F.2d at 108.

IV.

In this case, there is no dispute that the alleged harm suffered by Matreale arose from, or in the course of activity incident to, his military service in the NJANG, since his damages allegedly resulted from the conduct of his superior officers in evaluating and disciplining him. A straightforward application of the *Feres* doctrine as it has evolved in the Supreme Court and this Circuit, therefore, would appear to dictate the conclusion reached

by the District Court that Matreale's damages claims are barred by intra-military immunity.

Pressed by the overwhelming weight of the foregoing federal precedent, however, Matreale seeks to avoid such a straightforward application of the "federally created" *Feres* doctrine by attempting to convert this case into an exclusive state law matter. In that vein, Matreale argues that, as a *state* guardsman, serving under Title 32, he is a *state* employee suing other *state* employees, also serving under Title 32, under *state* law. Accordingly, his argument goes, the issue of immunity is one which should be addressed and resolved solely under state law; specifically, the question should be whether the NJDMVA is entitled to immunity under the NJLAD, rather than one addressed to federal law in the form of the *Feres* doctrine.

Matreale's entire position rests on his attempt to differentiate between state guardsmen serving pursuant to Title 10, on the one hand, and those serving pursuant to Title 32, on the other. Matreale contends that the *Feres* doctrine applies only to state guardsmen who have been mobilized to active duty under Title 10, but does not apply to guardsmen serving under Title 32, except to the extent those guardsman are engaged in drills or field training under 32 U.S.C. § 502(a)[3] at the time of the

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3. Title 32 U.S.C. § 502(a) provides in pertinent part:

> Under regulations to be prescribed by the Secretary of the Army or the Secretary of the Air Force . . .

(Cont'd)

alleged conduct, because guardsmen serving under Title 32 are *state*, as opposed to federal, employees.

Neither party in this case questions the fact that Matreale was serving under orders issued pursuant to 32 U.S.C. § 502(f)(1), and had not been mobilized under Title 10, at the time of the conduct in question.[4] Likewise, there is no dispute that all of the superior officers implicated in the alleged retaliatory behavior against Matreale also were serving under orders issued pursuant to 32 U.S.C. § 502(f). Finally, there is no dispute that at the time of the conduct in question, neither Matreale nor his superiors were engaged in drills or field training under 32 U.S.C. § 502(a). Under these circumstances, Matreale contends that at all material times all relevant parties in this case were serving in a state, not a federal,

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(Cont'd)

> each company, battery, squadron, and detachment of the National Guard, unless excused by the Secretary, shall
>
> > (1) assemble for drill and instruction, including target practice, at least 48 times each year; and,
> >
> > (2) participate in training at encampments, maneuvers, outdoor target practice, or other exercises, at least 15 days each year.

4. Matreale's unit subsequently was mobilized to active duty in Iraq pursuant to Title 10 on August 19, 2004. However, at the time of the conduct at issue in this case, Matreale was serving under Title 32.

capacity and, therefore, were state employees subject only to state law on the question of immunity.

Matreale's argument is without merit for several reasons. First, the essential premise of his entire case, *i.e.*, that, for immunity purposes, he was *solely* a state employee, is invalid. Rather, the District Court clearly was correct in holding that Matreale's Title 32 status at the time of the alleged incidents rendered him a federal employee for *Feres* purposes.

First, at the time of the conduct in question, Matreale was serving under orders issued pursuant to *federal* law, specifically, 32 U.S.C. § 502(f). His appointment as an officer was pursuant to the sixteenth clause of section 8, article I of the Constitution, and he began full time service with the national guard in December of 1992 on orders issued pursuant to 32 U.S.C. § 502(f). As the District Court correctly noted, these orders rendered Matreale, at all relevant times, a full time guardsman in the National Guard of the United States serving in accordance with the Active Guard Reserve Program.

In addition, this Court previously has applied the *Feres* doctrine to a guardsman serving under Title 32. In *Loughney v. United States*, 839 F.2d 186 (3d Cir.1988), we held that a national guardsman on active guard reserve duty status, as Matreale was in this case, was barred by the *Feres* doctrine from suing the government under the Federal Tort Claims Act. We emphasized there that "[i]t is simply the status of the claimant that is dispositive." *Id.* at 188. Because Loughney was a

"serviceman" and his injury arose out of or in the course of activity incident to his military service, we concluded that his FTCA claim was barred by the doctrine of intra-military immunity. *Id.*

Like Loughney, Matreale was a Title 32 serviceman in active guard reserve duty status and his alleged damages arose out of, or in the course of activity incident to, his military service. The fact that Loughney sued under the FTCA whereas Matreale is suing only under state law is of no consequence. As we recognized in *Jaffee, supra*, the *Feres* doctrine applies to suits founded on state law as well as to those founded on federal law because state law based suits have the same potential for undermining military discipline as do federal claims. *Jaffee*, 663 F.2d at 1239; *see also Coffman v. State of Michigan*, 120 F.3d 57 (6th Cir.1997) (statutory remedies under Michigan Handicapper's Civil Rights Act are *not* available to uniformed members of the armed forces including National Guard members).

Matreale's arguments in support of his position that his status as a Title 32 guardsman rendered him a state rather than a federal employee likewise are unpersuasive. First, his reliance on *Perpich v. Department of Defense*, 496 U.S. 334, 110 S.Ct. 2418, 110 L.Ed.2d 312 (1990) is misplaced. There, the Supreme Court held that Congress may authorize that members of the National Guard be assigned to active federal duty for training outside the United States without either the consent of the state governor or the existence of a national emergency. The Court, in addressing the unique

"dual enlistment" status of state National Guard members, observed that "[s]ince 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States." 496 U.S. at 345, 110 S.Ct. 2418. The Court held that under this dual enlistment system, "a member of the Guard who is ordered to active duty in the federal service is thereby relieved of his or her status in the State Guard for the entire period of federal service." *Id.* at 346, 110 S.Ct. 2418.

Matreale misconstrues the *Perpich* holding as implying that unless a state guardsman has been called to active duty under Title 10 and thereby loses his status in the state guard, he at all other times remains *solely* in state, not federal, status. But the plain holding of the Court is to the contrary. Under the holding in *Perpich*, Matreale attained *dual* status as a member of both the National Guard of the United States and the NJANG when he accepted his commission as an officer. 32 U.S.C. §§ 305 and 307; N.J.S.A. 38A:7-4. And while under *Perpich* a state guardsman *loses his state status* when he is called to active duty under Title 10, there is nothing in *Perpich* from which one reasonably may infer, as Matreale argues, that a Title 32 guardsman "loses", or does not have, federal status unless he is mobilized under Title 10 or engaged in drills or field training under 32 U.S.C. § 502(a). On the contrary, the Supreme Court in *Perpich* stressed that its holding that a state guardsman is stripped of his *state* status when he is called to active duty under Title 10 "merely recognizes the supremacy of federal power in the area of military

affairs." *Perpich*, 496 U.S. at 351, 110 S.Ct. at 2428. Our conclusion that a state guardsman serving under orders issued pursuant to Title 32, whether serving under § 502(a) or § 502(f), has and retains his federal status, along with his state status, even when he has not been called to active duty under Title 10, likewise recognizes*157 federal supremacy over military affairs.

Matreale also cites to *Phillips v. State Department of Defense*, 98 N.J. 235, 486 A.2d 318 (N.J.1985). This case too is of little value to his position. In *Phillips*, the New Jersey Supreme Court held that a national guardsman injured while training remained an employee of the state and was not an employee of the federal government, which would have precluded application of the New Jersey state military compensation law. While mentioning the *Feres* doctrine in passing, the court did not rely on the *Feres* rationale because "the statutory interplay between the New Jersey military compensation law and the New Jersey Tort Claims Act was not present in *Feres*." 98 N.J. at 321, 486 A.2d at 241. In short, *Phillips* did not authorize a tort suit against the State of New Jersey or any other person or entity by an injured guard member, whether in federal or state status, but merely provided a remedy under the state military compensation law for personal injuries suffered by a guard member in state status.

For the foregoing reasons, we agree with the District Court's determination that Matreale and his supervisors, all of whom were serving under orders issued pursuant to 32 U.S.C. § 502(f) at the time of the conduct in

question, were serving in a federal capacity and therefore were federal "employees" for purposes of the intra-military immunity doctrine.

Our conclusion that Matreale and his supervisors were federal (or at best dual federal-state) employees, at the time of the conduct in question is dispositive of his remaining argument that state law, rather than the *Feres* doctrine, should determine the question of immunity.[5] We need look no further than *Feres* for an unequivocal refutation of this argument. There, the Supreme Court stressed the point that the "relationship between the Government and members of its armed forces is 'distinctly federal in character' " and that "without exception, the relationship of military personnel to the Government has been governed by federal law." *Feres*, 340 U.S. at 143-44, 146, 71 S.Ct. at 158, 159 (citation omitted). The court explained:

> To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal government agencies, the

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5. Matreale argues that the NJLAD would not provide immunity for guardsman but suggests in any event that it is for the New Jersey Supreme Court, not this Court, to determine the immunity question under state law. Matreale therefore alternatively seeks certification of this question to the New Jersey Supreme Court. In light of our holding that Matreale is a federal employee for immunity purposes and that this case is governed by federal law, the issue of certification of the question to state court is moot.

> scope, nature, legal incidents and consequence of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority.

340 U.S. at 143-44, 71 S.Ct. at 158 (*quoting United States v. Standard Oil Co.*, 332 U.S. 301, 305-06, 67 S.Ct. 1604, 1607, 91 L.Ed. 2067 (1947)).

As stated above, at the time of the conduct giving rise to his suit, Matreale and his supervisors were members of the military serving in a federal capacity under orders issued pursuant to Title 32. As a result, federal authority as set forth in *Feres* and its progeny, rather than state law, governs the issue of immunity. And because the alleged harm suffered by Matreale arose from, or in the course of activity incident to, his military service in the NJANG, his claims for damages are barred under the intra-military immunity doctrine.

Our holding in this case is consistent with, and a logical corollary to, our prior precedent in the area of intra-military immunity. We previously have applied the *Feres* doctrine in *Loughney* to a Title 32 guardsman suing under federal law. We also have applied the doctrine in *Jaffee* to a federal active duty serviceman suing under state law. It is both reasonable and appropriate to apply the doctrine to Title 32 guardsman suing under state law and thereby to make immunity co-extensive for all dual-status national guardsmen. A concern for the disruption of the unique relationship of

military personnel to their superiors and to other military personnel that likely would result if one could hale another into court as a result of activity incident to military service is equally as compelling in the context of lawsuits brought by Title 32 guardsmen, whether serving under § 502(a) or § 502(f), as it is in the context of lawsuits brought by Title 10 guardsmen.

Accordingly, for the foregoing reasons, the District Court's finding that Matreale's damage claims founded on state law are barred by the *Feres* doctrine of intra-military immunity doctrine will be affirmed.

V.

The District Court also held that Matreale's requests for promotion and other injunctive relief arising from his negative officer evaluations are non-justiciable. Matreale did not challenge this aspect of the District Court's decision in his brief on appeal and, therefore, he has waived it. *Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir.1994). Accordingly, the District Court's grant of summary judgment in favor of the NJDMVA as to Matreale's request for injunctive relief also is affirmed.

VI.

For the foregoing reasons, we agree with the District Court that there are no genuine issues of material fact in the above matter and that the NJDMVA is entitled to judgment as a matter of law. Accordingly, we will affirm

the decision of the District Court granting summary judgment in favor of the NJDMVA.

SMITH, *Circuit Judge, concurring.*

I join in its entirety the excellent opinion of my esteemed colleague, Judge Diamond. In light of the purposes of the doctrine as well as its application by the Supreme Court and several courts of appeals-including this Court-the majority has aptly shown why we will apply intra-military immunity to bar the damages claims presented here. I write separately only to note that this Court, again and again, has dutifully applied the *Feres* doctrine in spite of perceived injustice and possibly in opposition to the actual text of the FTCA, but noting that we are bound to do so unless and until the Supreme Court or Congress tells us otherwise.[6]

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6. *See Richards v. United States*, 176 F.3d 652, 657 (3d Cir.1999) ("It is because *Feres* too often produces such curious results that members of this court repeatedly have expressed misgivings about it."); *Richards v. United States*, 180 F.3d 564, 565 (3d Cir. 1999) (Rendell, J., dissenting from a denial of a petition for rehearing en banc) ("I urge the Supreme Court to grant certiorari and revisit what we have wrought during the nearly fifty years since the Court's pronouncement in *Feres* . . . ."); *O'Neill v. United States*, 140 F.3d 564, 566 (3d Cir. 1998) (Becker, C.J., statement sur denial of the petition for rehearing) ("I urge the Supreme Court to grant *certiorari* and reconsider *Feres*."); *Loughney v. United States*, 839 F.2d 186, 188 (3d Cir. 1988) ("We, like the district court, are constrained by the decisions of the Supreme Court and must adhere to the view that Court has expressed."); *Estate of Martinelli v. United States*, (Cont'd)

Appendix A

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Dep't of Army, 812 F.2d 872, 874 (3d Cir. 1987) (stating that "any relaxation in the *Feres* doctrine must come from Congress"); *Heilman v. United States*, 731 F.2d 1104, 1112 (3d Cir. 1984) ("The existence of a system by which soldiers, veterans, and their families could receive some compensation for harm they suffered in the service of their country clearly influenced the original decision to preclude suits of the sort before us on review. There is reason to believe that this system has broken down." (citation omitted)); *Hinkie v. United States*, 715 F.2d 96, 97 (3d Cir. 1983) (conceding that "we have no legal authority, as an intermediate appellate court, to decide the case differently"); *Mondelli v. United States*, 711 F.2d 567, 568 (3d Cir. 1983) (stating that "we acknowledge the result to be a harsh one," but nonetheless barring suit under the doctrine of intra-military immunity); *Jaffee v. United States*, 663 F.2d 1226, 1239 (3d Cir. 1981) (en banc) ("This is a difficult and troubling decision."); *Thomason v. Sanchez*, 539 F.2d 955, 957 (3d Cir. 1976) ("We previously expressed reservations about the continuing validity of the broad *Feres* doctrine. Upon reconsideration we reiterate that concern; as we noted there, however, we are powerless to jettison *Feres* or to dislodge it sufficiently to create an exception for vehicular collisions involving servicemen." (citation omitted)); *Peluso v. United States*, 474 F.2d 605, 606 (3d Cir. 1973) (per curiam) (questioning the logic of the *Feres* decision but applying it to the facts of the case). It is no wonder that Justice Scalia in his *Johnson* dissent bluntly stated that " *Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." *United States v. Johnson*, 481 U.S. 681, 700-01, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987) (Scalia, J., dissenting) (quoting *In re "Agent Orange" Product Liability Litigation*, 580 F.Supp. 1242, 1246 (E.D.N.Y.1984)); *see also Costo v. United States*, 248 F.3d 863, 869 (9th Cir.2001) (reluctantly concluding that "until Congress, the Supreme Court, or an en banc panel of this Court reorients the [*Feres*] doctrine, we are bound to follow

(Cont'd)

The tension between the decision in *Feres* and the FTCA is obvious. As Justice Scalia stated in his oft-cited *United States v. Johnson* dissent, the exception in § 2680(j) illustrates that "Congress specifically considered, and provided what it thought needful for, the special requirements of the military. There was no proper basis for [the Supreme Court] to supplement—i.e., to revise—that congressional disposition." 481 U.S. 681, 693, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987) (Scalia, J., dissenting); *see* 28 U.S.C. § 2680(j) (excluding, under the FTCA, "[a]ny claim arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war* ") (emphasis added). In the five-plus decades since the *Feres* decision, the Supreme Court has expanded the doctrine of intra-military immunity in a variety of circumstances. *See, e.g., Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983) (*Feres* doctrine used to bar claims that were not even against the United States or based on the FTCA); *United States v. Shearer*, 473 U.S. 52, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985) (barring an FTCA claim of a soldier kidnapped and murdered when off-base and off-duty by another soldier).

The doctrine of intra-military immunity remains ripe for reconsideration by the Supreme Court in light of the questionable foundation upon which it stands. Prior panels of this Court, of other courts of appeals, and

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this well-worn path"); *id.* at 869 (9th Cir.2001) (Ferguson, J., dissenting) (challenging the constitutionality of the *Feres* doctrine on equal protection and separation of powers grounds).

numerous commentators have questioned the soundness of the *Feres* doctrine. A long line of Supreme Court cases, beginning with *Feres v. United States*, have been decided in seeming opposition to Congress' clearly expressed intent in the FTCA as to the scope of intra-military immunity. *Feres* and its progeny ought to be reexamined.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED MARCH 8, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HONORABLE JOSEPH E. IRENAS

CIVIL ACTION NO. 05-2032 (JEI)

FRANK MATREALE,

Plaintiff,

v.

STATE OF NEW JERSEY DEPARTMENT OF MILITARY & VETERANS AFFAIRS, AND THE NATIONAL GUARD OF THE UNITED STATES,

Defendants.

OPINION

IRENAS, Senior District Judge:

This lawsuit arises from various personnel actions taken against Plaintiff Frank Matreale ("Plaintiff") by his supervisors in the New Jersey Army National Guard ("NJANG"). Plaintiff alleges that his supervisors in the NJANG retaliated against him due to his participation in a sexual harassment case against another Guardsman.

Appendix B

Presently before the Court are the Motions for Summary Judgment of Defendant Department of Military and Veterans Affairs of the State of New Jersey[1] ("DMVA") and Defendant-Intervenor National Guard of the United States ("NGUS").

I.

Plaintiff joined the NJANG in 1981. By the time the events giving rise to the instant action occurred, Plaintiff had risen to the rank of Major in the NJANG.

In or about July, 1999, Plaintiff provided a statement to Lieutenant Colonel Kent Milliken ("Lt.Col.Milliken") during an inquiry into sexual harassment allegations against a Sergeant Major in the NJANG.[2] Although a copy has not been provided to the Court, it appears that Plaintiff's statement supported the account given by the *605 accuser. The investigation concluded that the Sergeant Major had committed sexual harassment. The accuser subsequently filed a complaint against the DMVA under the New Jersey Law Against Discrimination ("NJLAD"), although the outcome of the lawsuit is not clear from the record.

Plaintiff maintains that Lt. Col. Milliken and other NJANG officers engaged in a pattern of retaliation

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1. Through the powers granted to the Adjutant General in N.J.S.A. § 38A:3-6, the DMVA oversees the NJANG.

2. It appears that Lt. Col. Milliken was Plaintiff's direct supervisor.

against him for his role in the sexual harassment investigation. On March 18, 2000, Plaintiff was reprimanded by Brigadier General William Marshall ("Brig.Gen.Marshall"), III, for engaging in an improper superior-subordinate relationship and other violations arising from an incident on December 4, 1999, involving Plaintiff, the accuser in the sexual harassment case and several other female non-commissioned officers. (Admin. Rec. Ex. 1 at 15-16) Plaintiff contends that this reprimand was based on "misinformation and lies" provided to Brig. Gen. Marshall by Lt. Col. Milliken, and that his relationship with the accuser was strictly professional. (Admin. Rec. Ex. 1 at 17, 21) Brig. Gen. Marshall's letter of reprimand was placed in Plaintiff's personnel file.

He contends that Lt. Col. Milliken intentionally delayed Plaintiff's officer evaluation report due on January 31, 2000, until November 7, 2001. Plaintiff maintains that Lt. Col. Milliken did this so that Plaintiff could not appeal the derogatory statements made within the report in time to correct the report before his Selective Retention Board was convened. (See Admin. Rec. Ex. 1 at 26-7) He maintains that the derogatory report prevented him from being promoted to Lieutenant Colonel and eventually led to his termination from NJANG, although the termination was later overturned.

Plaintiff also contends that Lt. Col. Milliken berated and humiliated him in front of other officers, including one situation in which Lt. Col. Milliken ordered a

subordinate officer to remove Plaintiff from his command.[3] After this incident, Plaintiff privately asked Lt. Col. Milliken to cease the harassment, but Lt. Col. Milliken again berated and humiliated him for making the request. According to Lt. Col. Milliken, Plaintiff used "insulting, profane and disrespectful language" in speaking to him. (Admin. Rec. Ex. 1 at 24-5)

Lt. Col. Milliken and Adjutant General Paul Glazar ("Adj.Gen.Glazar") then brought charges against Plaintiff under the Uniform Code of Military Justice ("UCMJ") for conduct unbecoming an officer and a gentleman as a result of this incident. (*Id.*) On December 4, 2000, Brig. Gen. Marshall found that Plaintiff violated the UCMJ and ordered him to forfeit two months of his salary. (*Id.*) Plaintiff did not appeal the determination.

Plaintiff further contends that Lt. Col. Milliken and Adj. Gen. Glazar agreed to remove documentation of the UCMJ charge from Plaintiff's personnel file, but that Lt. Col. Milliken later violated this agreement and included the records in the file. As a result, Plaintiff was denied a promotion. Plaintiff applied to the Board for the Correction of Military Records to have the UCMJ charge information and resulting general officer memorandum of reprimand, as well as the November, 2001, officer evaluation report, removed from his file. The Board has not yet made a final determination. It appears, however, that at least some of this information

3. It is not clear from the record the exact date on which this incident occurred, however, it appears to have been in April, 2000.

was removed from Plaintiff's personnel file by Lt. Col. Milliken's successor.

Plaintiff's unit was mobilized for service in Iraq on August 19, 2004. Plaintiff remains on active duty with the Army to this date.

Plaintiff filed a Complaint against the DMVA in the Superior Court of Burlington County, New Jersey, on or about October 16, 2003. Plaintiff alleges that the DMVA, apparently through Lt. Col. Milliken and other members of the NJANG, retaliated against him for taking part in the sexual harassment investigation in violation of NJLAD. He seeks compensatory and punitive damages, reinstatement,[4] and any declaratory or injunctive relief[5] which may be proper.

On March 18, 2005, Judge Marie White Bell of the Superior Court signed an order permitting the NGUS to intervene in the case. NGUS removed the case to the District of New Jersey on April 14, 2005, with the consent of DMVA.

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4. Given that Plaintiff has not alleged that he has lost his job or was demoted, the Court interprets this request as seeking the promotion Plaintiff alleges he would have been given had the improper information not been included in his file.

5. The Complaint specifies "purging Plaintiff's personnel file of all derogatory statements." (Compl. Counts II & III) It appears that some of the materials to which Plaintiff objects have been removed from his file.

Appendix B

II.

Under Fed.R.Civ.P. 56(c), a court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In deciding a motion for summary judgment, the court must construe the facts and inferences in a light most favorable to the non-moving party. *Pollock v. Am. Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir.1986).

The role of the court is not to "weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The non-moving party may not rest on its pleadings to oppose a summary judgment motion but must affirmatively come forward with admissible evidence establishing a genuine issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

III.

NGUS and DMVA filed separate motions for summary judgment. Both Defendants seek dismissal of the Complaint on the grounds that Plaintiff's claims under NJLAD are barred by the doctrine of intra-military immunity or are otherwise non-justiciable.

Appendix B

A.

In *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), the United States Supreme Court held that the government is not liable under the Federal Tort Claims Act ("FTCA") for injuries to servicemen arising out of or in the course of activity incident to military service. In three related cases, the *Feres* decision rejected the claims of the executors of the estates of two soldiers, one who died in a barracks fire and the other as the result of allegedly negligent medical care, as well as the medical malpractice claim of a soldier who discovered that an Army surgeon left a towel in his abdomen during a procedure. The Court noted that "[t]he relationship between the Government and members of its armed forces is 'distinctly federal in character' " and that "[n]o federal law recognizes a recovery such as claimants*607 seek." *Feres*, 340 U.S. at 143-44, 71 S.Ct. 153 (citation omitted).

The doctrine of intra-military immunity first introduced in *Feres* has been expanded in subsequent decisions of the Supreme Court to encompass a greater range of claims and defendants. In *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), the Court extended the ruling in *Feres* to bar *Bivens* actions by soldiers against their superior officers, noting that "[h]ere, as in *Feres*, we must be '[concerned] with the disruptions of '[the] peculiar and special relationship of the soldier to his superiors' that might result if the

soldier were allowed to hale his superiors into court.' " *Chappell*, 462 U.S. at 304, 103 S.Ct. 2362 (citations omitted).[6]

The Third Circuit addressed the scope of the *Feres* intra-military immunity doctrine in *Jorden v. National Guard Bureau*, 799 F.2d 99 (3d Cir. 1986). In *Jorden*, a former member of the National Guard sued the National Guard Bureau ("NGB"), the Chief of the NGB, and the plaintiff's supervisors in the Pennsylvania Air National Guard ("the PANG defendants"), pursuant to 42 U.S.C. § 1983, alleging a conspiracy to harass and discharge him based on his race and in retaliation for his exercise of his First Amendment rights. The Third Circuit

6. *See also United States v. Shearer*, 473 U.S. 52, 57-60, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985) (*Feres* bars FTCA claim against the United States arising from the off-base kidnap and murder of an off-duty serviceman by another serviceman); *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673-74, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977)(extending *Feres* to bar indemnification claim brought against the United States by a government contractor in a negligence suit by a National Guardsman arising from injuries incurred during training mission); *Major v. United States*, 835 F.2d 641, 645 (6th Cir. 1987)(analysing *Feres* line of cases)("Review of these Supreme Court precedents makes it clear that in recent years the Court has embarked on a course dedicated to broadening the *Feres* doctrine to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose.") (emphasis in original).

concluded that the reasoning of *Chappell* extended to Section 1983 damages actions against state military officers, relying on the Supreme Court's command in *Butz v. Economou* that "where immunity of government officials is concerned, § 1983 and *Bivens* claims must be treated alike." *Jorden*, 799 F.2d at 105 (citing *Butz*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978)); *see also Loughney v. United States*, 839 F.2d 186 (3d Cir. 1988) (holding that *Feres* bars FTCA suit brought on behalf of Pennsylvania National Guard sergeant who was on Active Guard Reserve Duty Status when injured).

Neither the Supreme Court nor the Third Circuit have been presented with a case where, as here, a guardsman has brought a state statutory claim against a state department of military affairs. Several decisions in related cases, however, indicate that the Circuit would extend the doctrine of intra-military immunity to cover Plaintiff's LAD claim.

In *Jorden*, the Third Circuit held that the PANG defendants were entitled to immunity from the state law defamation claim brought by the plaintiff "in light of the recent decisions of the [Supreme] Court restricting the availability of damages actions against the military. . . ." 799 F.2d at 108 n. 12. Similarly, *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981), held that the rationale of *Feres* extended to bar a soldier's state law intentional tort claims against his Army supervisors arising from his military service. The Third Circuit noted that "[s]uits founded on state law have the same potential for undermining military discipline as federal tort claims." 663 F.2d at 1239.

Appendix B

The District of New Jersey in *Egloff v. New Jersey Air National Guard*, 684 F.Supp. 1275 (D.N.J. 1988), dismissed the state law claims brought by two former members of the Air National Guard against their supervisors arising from their discharge from guard service. Citing *Chappell*, *Jorden* and *Jaffee*, the District Court stated that "[c]onsistency with these authorities, we believe, requires the court to hold that plaintiffs' damage claims against their Air National Guard [supervisors] founded upon state law for actions which allegedly transpired while plaintiffs were participants in military training pursuant to Title 32 of the United States Code are barred by the military immunity doctrine." *Egloff*, 684 F.Supp. at 1283.

At the time of the events relevant to the Complaint, Plaintiff was a member of the NJANG and the Army National Guard of the United States ("ANGUS"). Plaintiff was participating in training exercises on orders issued pursuant to 32 U.S.C. § 502(f), which provides:

> Under regulations to be prescribed by the Secretary of the Army . . . , a member of the National Guard may—
>
> (1) without his consent, but with the pay and allowances provided by law; or
>
> (2) with his consent, either with or without pay and allowances;

> be ordered to perform training or other duty in addition to that prescribed under subsection (a).

Plaintiff was paid directly from the United States Treasury. (Aff. of S. Keyes, Donnelly Decl., Ex. 1) Plaintiff served in a full-time capacity as part of the Active Guard Reserve program (*id.*), as did the plaintiff in *Loughney.*[7] Moreover, Guardsmen serving on orders pursuant to Section 502 are considered to be federal employees for the purposes of the FTCA. 28 U.S.C. § 2671.

Plaintiff argues that *Feres* does not apply to Guardsmen serving under orders issued pursuant to Title 32 of the United States Code, as Title 32 Guardsmen retain their state status, citing *Perpich v. Dept. of Defense*, 496 U.S. 334, 110 S.Ct. 2418, 110 L.Ed.2d 312 (1990). He contends that *Feres* only applies to Guardsmen serving under orders issued pursuant to Title 10, which includes provisions authorizing executive officials to order reserve forces, including ANGUS, the militia of the states and the National Guard units of the various states to active duty. *See* 10 U.S.C. §§ 331-33, 12301-4, 12406. However, the Third Circuit and this District have applied the *Feres* doctrine to Title 32 Guardsmen. *See Loughney*, 839 F.2d 186, 188; *Urie v. Roche*, 209 F.Supp.2d 412 (D.N.J.2002) (*Feres* bars Title

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7. In *Stencel Aero*, the plaintiff was also a Guardsman serving on training orders, although the decision does not specifically state that the orders were issued pursuant to 32 U.S.C. § 502. 431 U.S. at 667 n. 1, 97 S.Ct. 2054.

VII claim by National Guard technician employed pursuant to 32 U.S.C. § 709); *Egloff*, 684 F.Supp. at 1283.

Plaintiff concedes that the injuries for which he seeks recovery arise out of, or were incurred in the course of activity incident to, his military service. This Court thus must conclude that his claims for damages against the Defendants are barred by the doctrine of intra-military immunity.

B.

Plaintiff's Complaint also seeks reinstatement and other injunctive or declaratory relief as may be proper, including purging his personnel file of "derogatory" statements. (Compl., Counts II & III) In *Jorden*, the Third Circuit observed that the Supreme Court has not established a per se rule barring judicial review of all military matters, and held that claims by servicemen for injunctive relief, specifically reinstatement, are justiciable unless they call for "ongoing judicial oversight" of the military. 799 F.2d at 108-11; *see also Dillard v. Brown*, 652 F.2d 316 (3d Cir.1981)(permitting claim by member of National Guard for injunctive relief where plaintiff sought declaration that certain regulations were unconstitutional).

Here, however, Plaintiff has not been terminated from his position with the Guard nor has he been demoted. It appears that he seeks promotion to the rank he might have achieved had the various reprimands and

UCMJ charges not occurred.[8] The *Jorden* exception to the intra-military immunity doctrine for claims seeking injunctive relief in the form of reinstatement is thus not applicable to Plaintiff.

Other courts that have been presented with claims by servicemen for promotion or the correction of military records have found these requests to be non-justiciable. The Court of Appeals for the District of Columbia Circuit noted that:

> The justiciability of this case involving a claim to a military promotion and distinct claims for the correction of military records is limited by the fundamental and highly salutary principle that:
>
> > [J]udges are not given the task of running the Army. The responsibility for setting up channels through which [complaints of discrimination, favoritism, *et cetera*] can be considered and fairly settled rests upon the Congress and upon the

8. The Court is aware of the statutory provision which makes retirement mandatory for majors in the Guard who are not selected for promotion more than once after twenty years of commissioned service. *See* 10 U.S.C. § 14506. The record does not reflect whether Plaintiff has been denied promotion more than once or the length of his service as a commissioned officer, and so the Court cannot determine whether this provision affects Plaintiff.

> President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Orloff v. Willoughby, 345 U.S. 83, 93-94, 73 S.Ct. 534, 540, 97 L.Ed. 842 (1953).

Kreis v. Sec'y of the Air Force, 866 F.2d 1508, 1511 (D.C.Cir. 1989)(declining to review Air Force major's claim for retroactive promotion).

In *Wenger v. Monroe*, the Ninth Circuit held that a Guardsman's request for injunctive relief was non-justiciable, where the plaintiff sought the removal of a "flag" in his record that prevented his promotion and an injunction barring the Guard from enforcing the mandatory retirement provisions against the plaintiff during the pendency of the suit. 282 F.3d 1068 (9th Cir. 2002). The Court concluded that:

> To determine whether a flag was appropriately placed on [the plaintiff's] record, and whether the investigation of the [ ] incident was conducted properly, a court would have to

> review all of the details of the placement of the flag and the conduct of the investigation. Thus, . . . , review in this case would require a court to scrutinize numerous decisions made by various individuals, and would necessarily "involve the court in a very sensitive area of military expertise and discretion."

Id. at 1076 (citations omitted).

This Court finds the rationale of *Kreis* and *Wenger* to be persuasive, and thus will hold Plaintiff's request for reinstatement / promotion and other injunctive or declaratory relief to be non-justiciable. If the Court were to hold otherwise, further proceedings would be required to review the correctness of the charges leveled against Plaintiff and to assess his fitness for promotion. It is beyond the competence of this Court to determine whether an Guardsman is qualified to be promoted to a higher rank, and outside its proper role to intrude upon the day to day operation of the military chain of command and its system of discipline in this fashion.

IV.

For the reasons set forth above, the summary judgment motions of DMVA & NGUS will be granted. The Court will issue an appropriate order.

Date: March 8, 2006

s/ Joseph E. Irenas
JOSEPH E. IRENAS, S.U.S.D.J.